

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Loretta Greer,)	
)	
Petitioner,)	
)	
v.)	CV 04-1265 PHX JAT (VAM)
)	
Attorney General, et al.,)	<u>REPORT AND RECOMMENDATION</u>
)	
<u>Respondents.</u>)	

TO THE HONORABLE JAMES A. TEILBORG, U.S. DISTRICT JUDGE.

Loretta Greer ("petitioner") filed a pro se Second Amended Petition pursuant to 28 U.S.C. § 2254. Petitioner presents four grounds for relief in the amended petition. (Doc. 65 at pp. 5-22). By previous order, the Court dismissed Ground IV and ordered respondents to file a response to the remaining claims for relief. (Doc. 90). Respondents filed a response opposing the granting of habeas relief. (Doc. 137).

BACKGROUND

In December, 1999, petitioner was convicted of two counts of first degree murder and two counts of child abuse for killing her two children, ages 5 and 4. (Doc. 137, Exhibit A at pp. 4-6). As a result of these convictions, petitioner was sentenced to two consecutive life terms with no possibility of parole, as well as two consecutive 17-year prison terms for the two felony child

1 abuse convictions. (Id. at Exhibit B).

2 Plaintiff appealed raising the following issues:

3 **Issue 1:** Denial of Right to Testify

4 **Issue 2:** [Petitioner's] September 30, 1994 Statement
5 was Involuntary

6 **Issue 3:** A Response to a Jury Question was Fundamental
7 Error

8 **Issue 4:** An inflammatory newspaper article the day of
9 trial that several jurors read portions of supported a
10 motion to strike the jury panel

11 (Doc. 137, Exhibit D at pp. 9-11).

12 The Arizona Court of Appeals affirmed petitioner's
13 convictions and sentences on January 24, 2002. (Doc. 137 at
14 Exhibit E). Petitioner sought review in the Arizona Supreme
15 Court, but raised only one issue, to wit:

16 She was denied her right to testify because she did not
17 make a knowing and intelligent waiver.

18 (Doc. 137, Exhibit F at p. 3). The Arizona Supreme Court denied
19 the petition for review without comment on June 25, 2002. (Id.
20 at Exhibit G). Petitioner filed a petition for writ of
21 certiorari with the U.S. Supreme Court on October 9, 2002. (Id.
22 at Exhibit H). The Supreme Court denied the petition on December
23 2, 2002. (Id. at Exhibit I).

24 On March 8, 2002, while her appeal was still pending before
25 the Arizona Supreme Court, petitioner filed a Notice of Post-
26 Conviction Relief pursuant to Ariz.R.Crim.P. 32.1. (Doc. 137 at
27 Exhibit J). On November 21, 2002, petitioner filed a post-
28 conviction relief petition raising the following claims:

1. When trial counsel violated the Rules of
Professional Conduct by telegraphing to the trial court

1 that his client would perjure herself, consequently
2 functionally depriving her of the right to testify and
3 undermining her credibility for sentencing, the conduct
4 amounted to ineffective assistance of counsel.

5
6 **2.** Trial counsel provided ineffective assistance under
7 Arizona law by disclosing a confidential communication
8 to the trial court.

9
10 **3.** Trial counsel provided ineffective assistance of
11 counsel by functionally waiving the client's right to
12 testify by informing the court she would perjure
13 herself.

14
15 **4.** As a matter of constitutional law, the trial court
16 denied [petitioner] a fundamental right by not
17 performing an on-the-record waiver of her right to
18 testify or making an inquiry into the trial court's
19 frustration of her right to testify.

20
21 **5.** Sentencing Greer to Life without Parole ("LWOP")
22 violates the principles of Apprendi and Ring, as well
23 as Due Process of Law.

24 (Doc. 137, Exhibit K at pp. 4-19).

25 On May 27, 2003, the trial court denied the post-conviction
26 petition. (Doc. 137, Exhibit L at p. 2). Petitioner was
27 subsequently granted five extensions of time to file a petition
28 for review to the Arizona Court of Appeals up through January 16,
2004. (Id. at Exhibit M). Petitioner filed nothing by this
deadline, however, on January 30, 2004, petitioner filed an
"Affadavit Supporting Petition for Review" in the trial court.
(Id. at Exhibit N). On February 11, 2004, petitioner filed a
"Notice of Petition for Reivew" in the trial court, and on
February 26, 2004, a petition for review was also filed in the
trial court. (Id. at Exhibits P and O). The petition for review
was evidently forwarded to the Arizona Court of Appeals, which
noted its filing on March 3, 2004, but nevertheless dismissed the
petition as untimely, noting that petitioner was required to file

1 the petition for review no later than January 16, 2004. (Id. at
2 Exhibit Q). In dismissing the petition for review, the Court of
3 Appeals stated that "[w]hether petitioner was without fault for
4 the untimely filing is a question of fact. The trial court may,
5 'after being presented with proper evidence, allow a late filing'
6 if it finds that petitioner was not responsible for the untimely
7 filing." (Id. at Exhibit Q). The record does not indicate if
8 petitioner sought review in the Arizona Supreme Court, although
9 petitioner states she sought review but review was denied. (Doc.
10 65 at p. 2). No documentation has been provided to support this
11 assertion.

12 On June 17, 2004, petitioner filed her first federal habeas
13 corpus petition. (Doc. 1). The Court dismissed the petition
14 with 30 days leave to amend because the petition failed to name a
15 custodian, failed to state claims in summary form, and failed to
16 allege exhaustion of state court remedies. (See Doc. 7 at pp. 1-
17 4). On February 11, 2005, the Court issued an order noting that
18 petitioner had failed to file a proper amended petition on the
19 court-approved form and again permitted her an additional 30 days
20 to file an amended petition. (See Doc. 44).

21 On February 28, 2005, petitioner filed an amended petition.
22 (Doc. 46). However, on March 9, 2005, petitioner moved to strike
23 the amended petition. (Doc. 50). On April 12, 2005, petitioner
24 filed a second amended petition. Petitioner labeled this a 3rd
25 Amended Petition. (Doc. 65). On May 3, 2005, the Court ordered
26 service with respect to Grounds I, II and III of the second
27 amended petition but dismissed Ground IV. (See Doc. 90). On
28

1 September 6, 2005, respondents filed a response contending that
2 all remainig claims in the second amended petition (Grounds I-
3 III) should be denied because they are untimely. Alternatively,
4 respondents allege that the claims are procedurally defaulted.
5 (See Doc. 137).

6 **DISCUSSION**

7 Respondents assert that the claims raised in the Second
8 Amended Petition are barred by the statute of limitations.
9 Alternatively, they argue that the claims have been procedurally
10 defaulted.

11 **I. Statute of Limitations**

12 **A. Law Generally**

13 As part of the Anti-Terrorism and Effective Death Penalty
14 Act of 1996 ("AEDPA"), Congress provided a 1-year statute of
15 limitations for all applications for writs of habeas corpus filed
16 pursuant to 28 U.S.C. § 2254, challenging convictions and
17 sentences rendered by state courts. This provision, codified at
18 28 U.S.C. § 2244, states, in pertinent part:

19 (d)(1) A 1-year period of limitations shall apply to an
20 application for a writ of habeas corpus by a person in
21 custody pursuant to the judgment of a State court. The
22 limitation period shall run from the latest of --

23 (A) the date on which the judgment became final by the
24 conclusion of direct review or the expiration of time
25 for seeking such review;

26 (B) the date on which the impediment to filing an
27 application created by State action in violation of the
28 Constitution or laws of the United States is removed,
if the applicant was prevented from filing by such
State action;

(C) the date on which the constitutional right asserted
was initially recognized by the Supreme Court, if the

1 right has been newly recognized by the Supreme Court
2 and made retroactively applicable to cases on
collateral review; or

3 (D) the date on which the factual predicate of the
4 claim or claims presented could have been discovered
through the exercise of due diligence.

5 In Calderon v. United States District Court for the Northern
6 District of California ("Beeler") (en banc), 128 F.3d 1283 (9th
7 Cir. 1997), the Ninth Circuit addressed the new limitations
8 period contained at 28 U.S.C. § 2244(d)(1). The Court noted that
9 prior to § 2244(d)'s enactment "state prisoners had almost
10 unfettered discretion in deciding when to file a federal habeas
11 petition" and that "delays of more than a decade did not
12 necessarily bar a prisoner from seeking relief." Beeler, 128
13 F.3d at 1286.

14 The Court noted, however, that the provisions of § 2244(d)
15 "dramatically changed this landscape" and a petitioner was now
16 "required to file his habeas petition within one year of the date
17 his process of direct review came to an end." Id. The Court,
18 following other circuits, also held that the period of
19 limitations "did not begin to run against any state prisoner
20 prior to the statute's date of enactment" of April 24, 1996.
21 Beeler, 128 F.3d at 1287. Thus, all federal habeas corpus claims
22 concerning state court judgments finalized prior to April 24,
23 1996, had to be filed by April 23, 1997,¹ or they were barred by

24
25 ¹ The Ninth Circuit has held that, pursuant to the counting
26 provisions outlined in Fed.R.Civ.P. 6, the one-year limitations
27 period for all habeas petitioner's challenging convictions or
sentences finalized prior to the April 24, 1996 effective date of
the AEDPA is April 24, 1997. Patterson v. Stewart, 251 F.3d 1243,
1246 (9th Cir. 2001).

1 the statute of limitations absent a showing the circumstances
2 surrounding the filing of the petition fell into one of the
3 categories listed in § 2244(d)(1)(B)-(D).

4 The Beeler Court also held § 2244(d) established a customary
5 statute of limitations period "subject to equitable tolling."
6 Id. at 1288-89. The statute itself provided for tolling the
7 limitations period when a "properly filed application for State
8 post-conviction or other collateral relief with respect to the
9 pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).
10 However, the Court cautioned that equitable tolling of the
11 limitations period "will not be available in most cases but will
12 only be granted if 'extraordinary circumstances' beyond a
13 prisoner's control make it impossible to file a petition on
14 time." Beeler, 128 F.3d at 1288-89 (citing Alvarez-Machain v.
15 United States, 107 F.3d 696, 701 (3rd Cir. 1997)).

16 B. Application of Law to the Facts of the Case

17 The record reveals that petitioner's direct appeal concluded
18 on December 2, 2002, when the U.S. Supreme Court denied her
19 petition for writ of certiorari. (Doc. 137 at Exhibit I).
20 However, 28 U.S.C. § 2244(d)(2) provides that "[t]he time during
21 which a properly filed application for State post-conviction or
22 other collateral review with respect to the pertinent judgment or
23 claim is pending shall not be counted toward any period of
24 limitation under this subsection." In this case, prior to the
25 conclusion of her direct appeal, petitioner filed a Notice of
26 Post-Conviction Relief pursuant to Ariz.R.Crim.P. 32.1 in the
27 trial court. (See id. at Exhibit J); see also Isley v. Arizona

1 Department of Corrections, 383 F.3d 1054, 1055-56 (9th Cir.
2 2004) (holding that in Arizona, a state post-conviction petition
3 is deemed "pending" for purposes of the tolling provision of 28
4 U.S.C. § 2254, when the notice is filed). As long as petitioner
5 had a "properly filed petition for post-conviction relief"
6 pending in state court, the 1-year limitations period was tolled.

7 The record indicates that the trial court denied the post-
8 conviction petition on May 27, 2003. (Doc. 137 at Exhibit L).
9 Arizona R.Crim.P. 32.9(c) gives petitioner 30 days to seek review
10 of the denial in the Arizona Court of Appeals from the date of
11 the trial court's denial. In this case, petitioner sought and
12 received numerous extensions of time to seek review before the
13 Arizona Court of Appeals, up through January 16, 2004. (Doc. 137
14 at Exhibit M). It further appears that petitioner did not file a
15 proper petition for review with the Arizona Court of Appeals
16 within that time frame. Instead, petitioner filed a belated
17 petition for review that was dismissed on March 8, 2004, as
18 untimely. (Doc. 137 at Exhibit Q). The record does not provide
19 documentation of whether petitioner sought further review before
20 the Arizona Supreme Court. Petitioner states she did seek review
21 before that court but the Arizona Supreme Court denied the
22 petition. (Doc. 65 at p. 2).

23 Respondents contend that because petitioner's petition for
24 review before the Arizona Court of Appeals was deemed untimely
25 under Arizona procedural rules, the one year limitations period
26 began to run when the trial court issued its denial of Rule 32
27 relief on May 27, 2003. Thus, they argue the federal habeas
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1 petition (originally filed on June 17, 2004) is untimely.

2 Respondents further contend that the original habeas
3 petition did not stop the running of the limitations period
4 because the petition was dismissed with leave to amend due to
5 procedural infirmities. (See Doc. 7). They argue the
6 limitations period actually ran until April 12, 2005, when
7 petitioner filed a second amended petition. They argue the
8 second amended petition does not relate back to the original
9 petition for tolling purposes. (See Doc. 137 at p. 7).

10 As a preliminary matter, with respect to respondents'
11 relation back argument, the Magistrate Judge believes that the
12 second amended petition does relate back. Respondents cite,
13 inter alia, Henry v. Lungren, 164 F.3d 1240 (9th Cir.), cert.
14 denied, 528 U.S. 963 (1999), to support their claim that the
15 second amended petition does not relate back to the original June
16 17, 2004 petition. However, in Henry, the court noted that when
17 the district court dismissed the original habeas petition, it
18 "did not expressly or impliedly retain jurisdiction of Henry's
19 original petition [and] there was no pending petition to
20 which Henry's new ... petition could relate back or amend." Id.
21 at 1241. In this case, the Court reserved dismissal of
22 proceedings and ordered petitioner to amend to correct
23 deficiencies in the original filing. (See Doc. 7). As a result,
24 the circumstances are substantially different than those
25 presented in Henry. For this reason, petitioner's second amended
26 petition does relate back and the operative date for filing the
27 federal petition remains June 17, 2004. Nevertheless, for the

1 reasons stated below, the petition is still untimely.

2 Even conceding that petitioner's second amended petition
3 relates back to her original filing and, thus, the limitations
4 period stopped running on June 17, 2004, petitioner's claims are
5 still time-barred unless the limitations period was tolled
6 between May 27, 2003 (when the state trial court denied her Rule
7 32 petition), and June 17, 2004 (when she filed her original
8 federal habeas petition), a period of 386 days, 21 more than
9 permissible. As noted, to toll the limitations period during any
10 part of this period, petitioner must have a "properly filed"
11 petition for post-conviction relief pending in state court. See
12 28 U.S.C. § 2244(d)(2).

13 In Pace v. DiGuglielmo, ___ U.S. ___, 125 S.Ct. 1807 (2005),
14 the Supreme Court construed the term "properly filed petition" as
15 contained in 28 U.S.C. § 2244(d)(2) to require that the state
16 post-conviction petition be filed in a timely manner.
17 Specifically, the Court stated "[w]e fail to see how timeliness
18 is any less a 'filing' requirement than the mechanical rules that
19 are enforceable by clerks, if such rules exist." Pace, 125 S.Ct.
20 at 1812. Nor did the Court find the existence of possible
21 exceptions to a state's timeliness requirements for post-
22 conviction petitions important. Specifically, the Court stated
23 that "a petition filed after a time limit, and which does not fit
24 within any exceptions to the time limit, is no more 'properly
25 filed' than a petition filed after a time limit that permits no
26 exception." Id. at 1811-12. The Court went on to hold:

27 ... it must be the case that a petition that cannot
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1 even be initiated or considered due to the failure to
2 include a timely claim is not 'properly filed.'
[Citations omitted.]

3 For these reasons, we hold that time limits, no
4 matter their form, are "filing" conditions. Because
5 the state court rejected petitioner's PCRA petition as
untimely, it was not "properly filed," and he is not
entitled to statutory tolling under § 2244(d)(2).

6 Pace, 125 S.Ct. at 1814.

7 Applying these principles to the case at bar, petitioner is
8 not entitled to statutory tolling of the limitations period for
9 any time her proceedings were pending in state court after May
10 27, 2003, when the trial court denied the petition. As noted,
11 the Arizona Court of Appeals dismissed the petition for review in
12 March, 2004, on the basis that it was untimely. In doing so, the
13 Court noted that although petitioner was granted several
14 extensions of time to file a petition for review, she
15 nevertheless failed to file a petition within the extended time
16 allotted. (See Doc. 137 at Exhibit Q). The propriety of the
17 Arizona Court of Appeals' holding, construing state legal
18 requirements for filing petitions for review, is not subject to
19 review by a federal habeas court. See Estelle v. McGuire, 502
20 U.S. 62, 67 (1991).

21 Having determined that the Arizona Court of Appeals rejected
22 petitioner's petition for review as untimely, the petition for
23 review was not "properly filed" for purposes of tolling the
24 limitations period "and [s]he is not entitled to statutory
25 tolling under § 2244(d)(2)" for any time her petition for review
26 was pending before the Arizona Court of Appeals. See Pace, 125
27 S.Ct. at 1814. Because no timely petition was pending in state
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1 court after the trial court denied relief on May 27, 2003, the
2 limitations period began to run from that date.² Thus, even
3 petitioner's original filing for habeas relief on June 17, 2004,
4 is untimely. Unless petitioner can establish entitlement to
5 statutory or equitable tolling, her claims are time-barred.

6 28 U.S.C. § 2244(d)(1)(B) - (D) lists various scenarios
7 which delay the running of the limitations period beyond the
8 entry of judgment (state-created impediments, new constitutional
9 right created, new factual predicate). None of these exceptions
10 appear applicable in this case and petitioner has made no
11 colorable or coherent argument that any of these exceptions might
12 be applicable in this case.

13
14 ²Arizona law affords a post-conviction relief petitioner 30
15 days to file a timely petition for review in the Arizona Court of
16 Appeals following the trial court's denial of Rule 32 relief. See
17 Ariz.R.Crim.P. 32.9(c). However, this 30-day period does not
18 automatically extend the period for tolling the limitations period
19 if petitioner fails to file for review in a timely manner.
20 Although 28 U.S.C. § 2244(d)(1) expressly provides that the
21 limitations period does not begin to run until "the judgment
22 bec[omes] final by the conclusion of direct appeal or the
23 expiration of the time for seeking such review; ..." (emphasis
24 added), this language is confined to determining when the
25 limitations period begins to run upon conclusion of direct review
26 and is not repeated with respect to proceedings for collateral
27 relief and their ability to toll the statute of limitations under
28 28 U.S.C. § 2244(d)(2). Section 2244(d)(2) provides only that the
period of time during which a *properly filed* petition for post-
conviction relief is *pending* tolls the limitations period. Case
law in this circuit and in at least one other circuit has held that
a post-conviction proceeding is "pending" during the interval
between the denial of post-conviction relief in one court and
review at the next level only if such review is sought in a timely
manner. See Nino v. Galaza, 183 F.3d 1003, 1005 (9th Cir. 1999),
cert.denied, 529 U.S. 1104 (2000); see also Melancon v. Kaylo, 259
F.3d 401, 405-06 (5th Cir. 2001). Since petitioner did not seek
review of the trial court's denial of Rule 32 relief in a timely
manner, she is not entitled to tolling of the limitations period
after the trial court issued its order denying relief.

1 With respect to equitable tolling, petitioner must show
2 "'extraordinary circumstances beyond a prisoner's control make it
3 impossible to file a petition on time.'" Spitsyn v. Moore, 345
4 F.3d 796, 799 (9th Cir. 2003). Thus, "'[w]hen external forces,
5 rather than a petitioner's lack of diligence, account for the
6 failure to file a timely claim, equitable tolling may be
7 appropriate.'" Lott v. Mueller, 304 F.3d 918, 922 (9th Cir.
8 2002). However, equitable tolling is unavailable in most cases
9 and "the threshold necessary to trigger equitable tolling [under
10 the AEDPA] is very high, lest the exception swallow the rule."
11 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir.), cert. denied,
12 537 U.S. 1003 (2002). Thus, it must be "external forces, rather
13 than a petitioner's lack of diligence, [which] account for the
14 failure to file a timely claim, ..." Lott, 304 F.3d at 922.

15 Review of the facts present in this case reveal petitioner
16 has not established, or even coherently alleged, a colorable case
17 for equitable tolling. Petitioner has offered no plausible or
18 convincing explanation for not filing a timely petition for
19 review in the Arizona Court of Appeals within the generous period
20 of time allowed her by the trial court. The court must conclude
21 that it was her lack of diligence in this regard and not an
22 external factor which resulted in the untimely petition for
23 review. As a result, petitioner has not established an
24 entitlement to equitable tolling and her claims for relief are
25 barred by the statute of limitations.

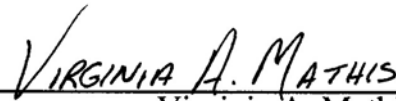
26 Because the Magistrate Judge believes petitioner's claims
27 are barred by the statute of limitations, it is not necessary to
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1 address respondents' alternative argument that the claims were
2 not properly exhausted in state court and, as a result, are
3 procedurally barred from consideration on federal habeas review.

4 IT IS THEREFORE RECOMMENDED that the Second Amended Petition
5 for Writ of Habeas Corpus be denied on the basis that all claims
6 raised are barred by the statute of limitations.

7 This Report and Recommendation is not an order that is
8 immediately appealable to the Ninth Circuit Court of Appeals.
9 Any notice of appeal filed pursuant to Rule 4(a)(1), Federal
10 Rules of Appellate Procedure, should not be filed until entry of
11 the district court's order and judgment. The parties shall have
12 ten (10) days from the date of service of this Report and
13 Recommendation to file specific written objections with the
14 Court. Thereafter, the parties have ten (10) days within which
15 to file a response to the objections. Failure to timely file
16 objections to the Magistrate Judge's Report and Recommendation
17 will result in a waiver of de novo review of the factual findings
18 and may result in the acceptance of the Report and Recommendation
19 by the district court without further review. See United States
20 v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003).

21 DATED this 8th day of November, 2005.

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23 

24 Virginia A. Mathis
25 United States Magistrate Judge
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